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The Ethical Obligations of Defence Counsel in Sexual Assault Cases

Forthcoming in Osgoode Hall Law Journal, Vol. 51, No. 2 (2014)

Elaine Craig

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Abstract:

The treatment of sexual assault complainants by defence counsel has been the site of significant debate for legal ethicists. Even those with the strongest commitment to the ethics of zealous advocacy struggle with how to approach the cross-examination of sexual assault complainants. One of the most contentious issues in this debate pertains to the use of bias, stereotype and discriminatory tactics to advance one's client's position. This paper focus on the professional responsibilities defence lawyer bear in sexual assault cases. Its central claim is as follows: defence counsel are ethically obligated to restrict their carriage of a sexual assault case (including the evidence they seek to admit, the lines of examination and cross-examination they pursue and the closing arguments they submit) to conduct that support finding of facts within the bounds of law. Put another way, defence counsel are ethically precluded from using strategies and advancing arguments that rely for their probative value on three social assumptions about sexual violence that have been legally rejected as baseless and irrelevant.

Keywords:

Sexual assault, feminism, consent, role of defence counsel, ethical obligations of lawyers

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The Ethical Obligations of Defence Counsel in Sexual Assault Cases

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Four Men On One Woman x Two...And An Introduction

On her fifteenth birthday, she was lured away from the bus stop where she waited to go to school by four young men. She had dated one of the men for several weeks and they had broken up before her birthday. She knew the others a little or not at all. They convinced her to go to one of their homes, promising they would return her to the bus stop in time for her afternoon classes. She boarded a bus with the four men, arriving fifteen minutes later at a home she had never been to before. She had no money for return transportation.

When they arrived at the apartment the four men forced her to engage in sexual acts. They penetrated her vaginally. They forced her to perform oral sex. They ejaculated on her. She spent May 15, 2002 being repeatedly sexually assaulted by these four men.

George Aristos, Joseph Paradiso, Gerald Yasskin and Nadir Sachak acted for the accused at their trial.¹ None of the accused testified nor were any defence witnesses called. The case turned almost entirely on her evidence. She spent September 15, 2003 being extensively cross-examined by these four men.

Defence counsel asked her why didn't she just run away?² Why didn't she call out for help?³ Why didn't she tell the police immediately?⁴ Why did she tell her friend before she told her parents?⁵ Why did she wait six days to tell her mother?⁶ Why didn't she tell the first person she saw in the elevator after the attack, or the bus driver or shopkeeper or any of the other strangers she crossed paths with on the way home?⁷

Defence counsel for one of the accused suggested to her that his client was just "goofing around" when on a previous occasion he lured her into a bathroom, forced his hand into her pants and penetrated her digitally.⁸ He asserted that she had engaged in sex with other individuals on that day, suggesting this made it more likely that she would have consented to the digital penetration by his client.⁹

They called her a liar.¹⁰ They said she was evasive and outright dishonest.¹¹ She was accused of perjury.¹² It was suggested that she made the whole thing up out of animus for the young man who broke up with her a few weeks earlier.¹³

Defence counsel questioned her on her failure, apart from one slap to the face of one of the young men, to physically resist the assaults.¹⁴ Contradictorily, counsel also argued that she should be disbelieved because she slapped one of them in the face (and denied

¹ *R v A(A)*, 2004 ONCJ 101, 62 WCB (2d) 405.

² *Ibid* at 9.

³ *Ibid* at 16.

⁴ *Ibid* at 20.

⁵ *Ibid* at 21.

⁶ *Ibid* at 41.

⁷ *Ibid* at para 39.

⁸ *Ibid* at para 26. The trial judge in this case also convicted this accused of sexual assault as a result of this prior incident involving forced digital penetration.

⁹ *Ibid* at 46.

¹⁰ *Ibid* at 35; *Ibid* at 36.

¹¹ *Ibid* at 35.

¹² *Ibid* at 35.

¹³ *Ibid* at 37.

¹⁴ *Ibid* at 43.

giving another one of them a “blow job”).¹⁵ They asserted that such feistiness in response to the four men suggested that any sexual activity that happened that day was consensual.¹⁶ Several of them argued that she should be disbelieved because of a lack of evidence of significant physical injury.¹⁷ If she had been attacked as she said why didn’t she have any injuries to show for it?

The four young men were convicted of sexual assault.

...

This paper focuses on the professional responsibilities defence lawyers bear in sexual assault cases. I advance two central claims. First, specific reforms to the substantive and procedural/evidentiary law of sexual assault impose ethical obligations on defence counsel to refrain from strategies that invoke or trigger the underpinning social assumptions rejected by these reforms. Second, despite these law reforms and the ethical obligations arising from them, defence counsel in Canada continue to invoke these strategies.

While a broader claim about what constitutes an ethical defence of someone accused of sexual assault stands to be made, the argument advanced in this paper is intentionally narrow: Defence counsel are ethically obligated to restrict their carriage of a sexual assault case (including the evidence they seek to admit, the lines of examination and cross-examination they pursue and the closing arguments they submit) to conduct that supports finding of facts within the bounds of law. Put another way, defence counsel are ethically precluded from using strategies and advancing arguments that rely for their probative value on three social assumptions about sexual violence that have been legally rejected as baseless and irrelevant.

This paper is divided into three parts. Part I elucidates the three social assumptions or narratives about sexual violence that have been explicitly rejected through law reforms. Part II demonstrates the ways in which, despite changes to the law, defence counsel often continue to rely on these rejected social assumptions about sexual violence. Parts I and II establish the foundation for the claims advanced in Part III. Part III examines the relationship between these three legal reforms, the internal and external limitations on the constitutionally guaranteed right to full answer and defence, and the impact of schematic thinking on assessments of complainant credibility. An examination of the relationship between these three factors demonstrates that, in Canada, even legal ethicists strongly committed to the concept of zealous advocacy should accept that there is an ethical obligation not to invoke, rely upon and consequently perpetuate these three legally rejected social assumptions about sexual violence.

II. Three Outdated Assumptions About Sexual Violence Have Been Explicitly Rejected by Law Reforms

For decades feminists and other law reformers have laboured at eliminating from

¹⁵ *Ibid* at 42.

¹⁶ *Ibid* at 42.

¹⁷ *Ibid* at 43.

the substantive criminal law and the rules of evidence the baseless and discriminatory social assumptions about women in general and sexual violence in particular upon which much of the law of sexual violence was structured.¹⁸ Statutory reforms and judicial decisions have pursued that result both directly and indirectly.¹⁹ Three social assumptions or narratives about sexual violence that have been specifically and explicitly rejected through legislative and jurisprudential law reforms in Canada include (1) the baseless assumption that once a woman's chastity has been lost she's more likely to have sex with anyone and less likely to tell the truth; (2) that women who were actually raped will tell someone immediately and that women who do not report an attack promptly are lying; and (3) that women who genuinely do not want to engage in sex will resist physically or attempt escape.²⁰

i. Distrusting the Unchaste Woman – Rejected by Section 276

Consider first the relevance of a complainant's prior sexual experiences to allegations of sexual assault. Thirty-five years ago Chief Justice Bray of the Australian Court of Appeal recognized the irrelevance of prior sexual history in many contexts:

I find it hard to believe that any reasonable person at *the present time* could assent to any of the following *absurd propositions*:

1. That a willingness to have sexual intercourse outside marriage with someone is equivalent to a willingness to have sexual intercourse outside marriage with anyone;
2. That the unchaste are also liable to be untruthful;
3. That a woman who has had sexual intercourse outside marriage is a fallen woman and deserves any sexual fate that comes her way. (emphasis added)²¹

Parliament and the courts in Canada have also rejected, at least on the face of the law, these same absurd propositions.²² The *Criminal Code of Canada* prohibits admission of a complainant's prior sexual history for the purposes of discrediting her on the basis of lack of chastity or inferring that prior sexual experience alone makes her more likely to have

¹⁸ See Christine Boyle, *Sexual Assault* (Toronto: Carswell Company Limited, 1984), for a comprehensive discussion of the early reforms and their relationship to the rejection of the stereotypical attitudes about women that underpinned the criminal law in Canada.

¹⁹ See for example *Criminal Law Amendment Act 1975*, SC 1974-75-76, c 93 (removing the requirement that judges warn juries that it was unsafe to convict solely on the uncorroborated evidence of the complainant); *An Act to Amend the Criminal Code in relation to sexual offences and other offences against the person*, SC 1980-81-82-83, c 125, s 19 (repealing the corroboration rule altogether; removing rape and adding sexual assault; removing the marital rape exemption). These reforms, as well as others such as statutory limits on access to third party records, were aimed at responding to some of the following discriminatory attitudes about sexual violence: Women cannot be trusted. Women who act a certain way and dress a certain way are partly to blame for the infliction of sexual violence. Poor women, women of colour, and women employed in the sex industry tend to lie about rape. Women cannot really be forced to have sex against their will. Women are inclined to lie about rape out of spite.

²⁰ For further elaboration on the distinction between explicit, direct rejection of discriminatory assumptions about rape and indirect pursuit of this objective see the discussion on internal and external parameters on the right to full answer and defence *infra* Part III.

²¹ *R v Gun Ex parte Stephenson*, (1977) 17 SASR 165 at 167 (SC, FC).

²² *Criminal Code*, RSC 1985, c C-46, s 276; *R v Seaboyer*, (1987) 61 OR (2d) 290, 37 CCC (3d) 53.

consented to the sex at issue in the allegation.²³ The sexual nature of prior activity with the accused or a third party is irrelevant to the matter of whether she consented to the sexual touching at issue or whether she is a credible witness.²⁴

This change to the law explicitly rejected two related social assumptions about rape. First, it rejected the narrative that women who are “loose” are untrustworthy. Second, it rejected the assumption that women with previous sexual experience are more likely to consent than are women who are “chaste” - the absurd proposition that once a woman has had sex with one man she becomes less discriminating in her sexual choices. This is not to suggest that evidence of sexual activity is always inadmissible, or even always inadmissible as relevant to consent. Evidence of prior sexual activity remains admissible if it is relied upon to give rise to an inference other than one of these two outdated social assumptions.²⁵

ii. Failure to Raise a Hue and Cry Suggests Fabrication - Rejected in *R v DD*

The second social assumption explicitly rejected through law reform pertains to the length of time between the alleged incident of sexual violation and the complainant's disclosure of the incident. As a consequence of the combination of the amendment to the *Criminal Code* abrogating the doctrine of recent complaint²⁶ and the Supreme Court of Canada's ruling in *R v DD*, the timing of disclosure of a sexual assault alone is now irrelevant to the matter of whether a sexual assault complainant is a credible witness.²⁷ It is an error of law to draw an adverse inference as to credibility solely on the basis that disclosure of the incident was delayed.²⁸ The social assumption rejected by this reform to the law is that a woman who is sexually violated will, at first opportunity, raise a hue and cry – that the natural time to disclose a sexual assault is as soon as possible after it has happened.²⁹ Prior to these reforms it was a “strong...presumption against a woman that she made no complaint in a reasonable time after the fact”.³⁰ It is no longer permissible,

²³ *Criminal Code*, *ibid*.

²⁴ *Seaboyer*, *supra* note 22.

²⁵ So for example, defence counsel could introduce evidence of a complainant's sexual activity with someone other than the accused in order to explain the physical conditions on which the Crown relies to establish intercourse or the use of force (such as the presence of semen or injury). Evidence of prior sexual activity can be used to attack the complainant's credibility by demonstrating a motive to fabricate (Justice McLachlin uses the example of a father accused of sexual acts with his young daughter who sought to present evidence that the source of the accusation was his earlier discovery of the fact that the girl and her brother were engaged in sexual relations. The defence argued that the daughter accused him of the act out of animus toward him after he stopped the sibling relationship. (*Seaboyer*, *supra* note 22)

²⁶ *Criminal Law Amendment Act*, SC 1980-81-82-83, c 125, s 19. For an explanation of the doctrine of recent complaint see D Fletcher Dawson, “The Abrogation of Recent Complaint: Where Do We Stand Now?” (1984) 27 *Crim LQ* 59.

²⁷ *R v DD*, 2000 SCC 43 at 63-65, 2 SCR 275: “The significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons. . . react to acts of sexual abuse.... A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.”

²⁸ *R v WR*, [1992] 2 SCR 122, 13 CR (4th) 257.

²⁹ *R v DD*, *supra* note 27.

³⁰ *Ibid* at 60, citing *R v Lillyman*, [1896] 2 QB 167 at 170; D Fletcher Dawson, *supra* note 26.

according to the Court, to rely on the timing of disclosure alone to draw an adverse inference as to the complainant's credibility.³¹

iii. Failure to Fight Back Demonstrates Consent – Rejected by Section 273 and *Ewanchuk*

The third reform relates to the affirmative definition of consent established by amendments to the consent provisions of the *Criminal Code* in combination with the decision in *R v Ewanchuk*.³² The Supreme Court of Canada in *Ewanchuk* determined that consent to sexual touching is based on the complainant's subjective state of mind at the time of the incident and that to establish a mistaken belief in consent defence requires a belief that the complainant communicated consent through words or actions.³³ An accused's belief that a complainant did not say no will not exculpate the accused nor will his belief that she said no but meant yes. A complainant's passivity is not a defence.³⁴ It is only a mistaken belief that the complainant *communicated* consent, where the accused took reasonable steps to ascertain that it was present, which will raise a reasonable doubt as to *mens rea*.³⁵ The social assumption rejected by these changes to the law is that a woman cannot be raped against her will – that a woman who actually does not want to engage in sex will fight a man off.³⁶

To summarize, the law of sexual assault in Canada explicitly rejects inferential reasoning premised on the assumptions that sexually active women are both more likely to have said yes and more likely to lie on the stand, that women who are actually raped will raise a hue and cry at first opportunity, and that women who failed to fight back actually “wanted it”. To draw inferences reliant upon any of these three social assumptions about sexual violence constitutes an error of law. The enactment of section 276 of the *Criminal Code*, the abrogation of the doctrine of recent complaint followed by the Court's ruling in *D.D.* and the definition of consent adopted in *Ewanchuk* and sections 273.1 and 273.2 of the *Criminal Code* arose because of a recognition that these social assumptions about sexual violence are, to use Chief Justice Bray's word from thirty-five years ago, absurd. As will be discussed in Part III, the absurdity of these narratives makes evidence reliant on them for its relevance inadmissible. More than just absurd, these social assumptions or stereotypes are irrelevant, discriminatory and harmful, and outrageously outdated. It seems implausible that members of the legal profession would invoke them today. Yet these are

³¹ *R v DD*, *supra* note 27; *R v W(R)*, *supra* note 28.

³² *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193; *Criminal Code*, *supra* note 22 at section 273 (defining consent to sexual touching); *Supra* note 22 at s 273.2 (establishing the reasonable steps requirement for defence of mistaken belief in consent).

³³ Both at common law (*Ewanchuk*, *supra* note 32 at 36) and under s.273.1 of the *Criminal Code* (*supra*, note 22) consent must be freely given in order to be legally effective. Duress, abuse of trust, and coercion all vitiate consent to sexual touching.

³⁴ *R v MLM*, [1994] 2 SCR 3, 131 NSR (2d) 79.

³⁵ Section 265(3) of the *Criminal Code* (*supra* note 22) defining consent as a defence to assault (including sexual assault) stipulates that no consent is obtained where the complainant submits or *does not resist* by reason of the application of force, threats or fear of the application of force, fraud or the exercise of authority. Section 273.2(b) of the *Criminal Code* (*supra* note 22) established that the defence of mistaken belief in consent will not be available where the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain consent.

³⁶ Lynda Holmstrom & Ann Burgess, *The Victim of Rape: Institutional Reactions* (New Brunswick, NJ: Transaction Books, 1983).

the stories that defence lawyers in Canada often continue to tell about the women who have accused their clients of rape.³⁷ The next part of this paper details reliance on these antiquated and unethical strategies to discredit complainants by invoking the social assumptions rejected by these three law reforms.

II. Discredited Assumptions About Women Continue to Receive Widespread Endorsement

Consider again the conduct of defence counsel in the case this discussion opened with - *R v A(A)*.³⁸ Together the four lawyers in *R v A(A)* through vigorous and lengthy cross-examination explicitly and repeatedly invoked all three of these discriminatory attitudes and baseless factual inferences about sexual violence.³⁹

They attempted to discredit her because she didn't run from the apartment screaming rape to the bus driver or pizza delivery person.⁴⁰ They argued that her failure to resist, to physically fight these four men off, suggested she must have actually consented to any sexual acts which occurred.⁴¹ It was suggested she had previously been involved in an orgy and that this implied she had consented to other sexual acts.⁴²

These lawyers, who encouraged the Ontario Court of Justice to assume that a sixteen year old girl who has *actually* spent hours being gang raped by four men would reveal this profound violation to a pizza delivery man sharing an elevator with her minutes after the attack, might well have quoted from this archaic passage cited by Wigmore in 1923:

When therefore a virgin has been so deflowered and overpowered...forthwith and while the act is fresh she ought to repair with hue and cry to the neighboring vills and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress.⁴³

Similarly, they could have relied for authority on a note from the 1952 Yale Law Journal to support the suggestion that she must have wanted to be repeatedly penetrated orally and vaginally by the penises and hands of four different men, otherwise she would have fought back: "A woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might arise after willing participation."⁴⁴

³⁷ See the discussion of cases in Part II, *infra* pg 10 - 15.

³⁸ *Supra* note 1

³⁹ The trial judge variously described their cross-examination of the complainant as vigorous, lengthy, extensive, and repetitive. *Ibid* at paras 19, 20, 21, 38, 48.

⁴⁰ *Ibid* at 9, 16, 20, 21.

⁴¹ *Supra* note 1 at 43.

⁴² *Supra* note 1 at 46.

⁴³ Taken from *R v DD supra* note 27 at 60 where Justice Binnie quotes from an archaic passage cited in John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada (Wigmore on Evidence)*, 2d ed, vol III (Boston: Little Brown & Co, 1923) at 764.

⁴⁴ Note: Yale Law Journal, "Forcible and Statutory Rape: An Exploration of the Operation of Objectives of the Consent Standard" (1952) 62 Yale LJ 55 at 67.

They could have pointed to the words of Wigmore quoted in the 1970 edition of his seminal evidence law text to support their proposition that the complainant's choice to engage in consensual sex earlier in the day suggests she was also consenting when one of the accused followed her into the bathroom and forced his fingers into her vagina: "The unchaste ... mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim."⁴⁵

The parallels between the assertions made by the lawyers in *R v AA* and these outdated passages are not noted merely in an effort to be inflammatory. It is important to be clear that lawyers who make the kinds of arguments and pursue the lines of cross-examination engaged in by defence counsel in *R v A(A)* are making the same types of claims, underpinned by the very same assumptions about women, that seem so obviously outrageous and offensive when phrased in the way they were articulated by Wigmore and his ilk forty, sixty, or ninety years ago.

The lawyers' conduct in *R v A(A)* is not anomalous. Continued reliance by defence counsel on these discriminatory stereotypes is not uncommon. The practices highlighted so well in *R v A(A)* reveal a systemic problem. They are not the practices of a few problematic lawyers. Indeed, an examination of recent case law reveals that in many cases defence counsel in sexual assault cases in Canada invoke these social assumptions explicitly and seemingly unapologetically.⁴⁶

Consider the hue and cry myth. In many cases lawyers explicitly rely on delayed disclosure to discredit the complainant.⁴⁷ The cross-examination of the complainant in *R v U(J)* provides an illustration.⁴⁸ Defence counsel suggested to the complainant that the reason she delayed disclosure was because she was making it up – that the reason she

⁴⁵ John Henry Wigmore & James Harmon Chadbourn, *Evidence in Trials at Common Law* (Boston, Toronto: Little Brown, 1970) at 736.

⁴⁶ See *infra* FN 47, 51, 59. See also Jennifer Temkin, "Prosecuting and Defending Rape: Perspectives From the Bar" (2000) 27:2 *Brit JL & Soc'y* 219 (observing that the lawyers she interviewed in the United Kingdom did not report any ethical quandary with invoking these types of stereotypes). See Gillian Balfour & Elizabeth Comack "Whacking the Complainant Hard: Law and Sexual Assault" in *The Power to Criminalize* (Fernwood Publishing: Manitoba, 2004) 111 (discussing the use of stereotypes to discredit sexual assault complainants and quoting a statement made at a 1988 meeting of criminal defence lawyers in which an Ottawa lawyer asserted that "you've got to attack the complainant hard with all you've got".)

⁴⁷ See for example *R v A(A)*, *supra* note 1; *R v HT*, 2008 NLTD 106, NJ No 210; *R v Nitsiza*, 2007 NWTSC 53, 74 WCB (2d) 495; *R v RJW*, [2007] 385 NR 389, 268 BCAC 320; *R v LF*, [2006] 71 WCB (2d) 307, OJ No 4173; *R v Sandfly* (2008), 330 SaskR 6, 64 CR (6th) 53; *R v BJW*, 2006 ONCJ 455, OJ No 4811; *R v CDR*, (2002) 53 WCB (2d) 127, NJ No 50; *R v B(FF)*, [1993] 1 SCR 697, 120 NSR (2d) 1; *R v OA*, (2005) 63 WCB (2d) 303, OJ No 187; *R v PC*, (2004) ONCJ 160, 72 WCB (2d) 788; *R v Hoosein*, (2010) ONSC 4452, OJ No 3477; *R v H(H)*, 2009 ONCJ 730, OJ No 6073; *R v LF*, 2002 CarswellOnt 178; *R. v. Skunk*, 2010 ONCJ 209, 2010 CarswellOnt 3895; *R v C(DA)*, 2010 SKQB 194, 2010 CarswellSask 348; *R v Oickle*, 2010 NSSC 182, NSJ No 262; *R v Hoang*, 2005 ONCJ 402, 66 WCB (2d) 653; *R v Nayanookesic*, 2010 ONCJ 47, 2010 OJ No 669; *R v K(M)*, [2006] OJ No 4976, 2006 CarswellOnt 7933; *R v M(B)*, 2007 NSPC 56, 76 WCB (2d) 97; *R v JM*, [2004] OJ No 5976 at HN, 2004 CarswellOnt 6693; *R v L(HA)*, 2002 CarswellMan 370 at 46; *R v Palardy*, 2007 CarswellOnt 9687 at 108; *R v CR*, 2008 CarswellOnt 812 at 86; *R v Pikayuk*, 2009 NUCJ 14, NuJ No 15; *R v S(TH)*, 2002 CarswellOnt 5313; *R v AA*, (2009) NUCJ 1, NuJ No 1. In earlier work I discussed the limited circumstances in which delayed disclosure may give rise to an adverse inference without resorting to the hue and cry myth: Elaine Craig, "The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence" (2011) 36 *Queen's LJ* 1.

⁴⁸ 2011 ONCJ 457 at 50, 97 WCB (2d) 149.

didn't tell her brothers was because it never happened.⁴⁹ Were a trier of fact to draw an adverse inference of credibility based on such evidence and argument it would be an error of law.⁵⁰

As occurred in *R v AA*, defence counsel in many cases rely on prior sexual history to prove that the complainant is unreliable or is more likely to have consented to the sexual acts at issue in the allegation.⁵¹ In *R v S(TM)*, for example, defense counsel argued that a complainant's flirtatious behavior with other girls at a party – her sexually suggestive dancing – both impacted on her credibility and was evidence of a mistaken belief in consent.⁵² The defense argument was that the complainant's "dirty dancing" at a party earlier on the evening of the attack made her less believable and made her appear sexually uninhibited and "open" such that the defendant mistakenly believed she was consenting when he wandered into a bedroom where she had passed out and proceeded to penetrate her with his penis.⁵³ Appropriately so the trial judge in *R v S(TM)* was unable to see any logical value at all to the defence counsel's argument.⁵⁴

The submission in my view is still reduced to an assertion that the complainant was likely consenting because she had earlier enjoyed with others being engaged in sexual activities. This however repeats the illogic and stereotypical offensiveness of the prior sexual conduct mythology⁵⁵

Similarly, as Janine Benedet has observed, in cases involving allegations of sexual violence between spouses and other ongoing sexual partners counsel commonly seek to cross examine a complainant on her sexual relationship with the accused to show that she had a preference for kinky sex as evidence of a mistaken belief in consent.⁵⁶ This occurs despite the fact that under the affirmative definition of consent established in *Ewanchuk* a preference for kinky sex is not relevant to the defence of mistaken belief in consent. As Professor Benedet explains, if the focus of the mistaken belief defence is on whether the complainant communicated her voluntary agreement to the accused, the only past history that is arguably relevant would relate to how voluntary agreement was communicated by the complainant to the accused in the past.⁵⁷ Yet instead lawyers in these kinds of cases

⁴⁹ *Ibid* at 50.

⁵⁰ *Supra* note 27.

⁵¹ See for example *R v P(NA)*, 2001 CarswellOnt 1527 at 15; *R v Carrie*, 2012 ONSC 1678 at 17, OJ No 1150; *R v Mondesir*, 2004 CarswellOnt 6405; *R v A(ADJ)*, 1998 CarswellBC 854; *R v Hicks*, 2009 CarswellOnt 920 at 17, OJ No 744; *R v Nepinak*, 2010 BCSC 1677, 82 CR (6th) 362; *R v Drost*, (1998) 198 NBR (2d) 72 at 6, 37 WCB (2d) 427; *R v Roper*, (1997) 32 OR (3d) 204, 33 WCB (2d) 423; *R v B(B)*, 2009 CarswellOnt 1082, 64 CR (6th) 58; *R v B(AJ)*, 2007 MBCA 95, 225 CCC (3d) 171; *R v Squires*, 2012 NLCA 20, 320 Nfld & PEIR 39; *R v S(TM)*, 1998 CarswellOnt 5239; *R v Kergan*, 2007 CarswellOnt 930 at 51, OJ No 625; *R v Muvunga* [2013] OJ No 2518.

⁵² *R v S(TM)*, *ibid*.

⁵³ *Ibid* at 17.

⁵⁴ *Ibid* at 39, 45.

⁵⁵ *Ibid* at 46.

⁵⁶ See Janine Benedet, "Probity, Prejudice, and the Continuing Misuse of Sexual History Evidence" (2009) 64 CR (6th) 72. See also *R v Mondesir*, *supra* note 50; *R v B(B)*, *supra* note 50.

⁵⁷ Janine Benedet, "Case Comment *R v B(AJ)*" (2007) 51 CR (6th) 336.

lead evidence of prior “kinky sex” to show that an accused reasonably believed that a woman who has consented to kinky sex in the past would have consented to the supposedly kinky sex at issue in the allegation.⁵⁸

Defence counsel in some cases invoke the social assumptions about women and sex rejected by the definition of consent established in *Ewanchuk* and section 273.2 of the *Criminal Code*.⁵⁹ Recall that the definition of consent to sexual touching turns on the complainant’s subjective willingness to participate and that the defence of mistaken belief in consent requires evidence of a complainant’s affirmative indication through words or conduct. This definition rejects the proposition that a woman’s passivity or failure to physically resist indicates a secret willingness to engage in the sexual conduct at issue. *Ewanchuk* and sections 265 and 273 of the *Criminal Code* render evidence of passivity irrelevant if its purpose is to prove either consent or mistaken belief in consent based on the inference that a woman who doesn’t want to have sex will fight back.⁶⁰ Evidence aimed at invoking legally rejected stereotypes is irrelevant. Despite this legal definition of consent some lawyers argue, as they did in *R v A.A.*,⁶¹ that evidence of passivity, lack of evidence of physical injury, or failure to attempt escape suggests that the complainant was consenting.⁶²

The lawyers in these cases appear to ignore both the legal reforms prohibiting reliance on these three social assumptions themselves and the reasons why these reforms were instigated. They explicitly invoke stereotypes and discriminatory beliefs and they do so by seeking to introduce irrelevant evidence and advance impermissible lines of reasoning.

In other cases, defense counsel acknowledge the existence of a rule in form, such as section 276 of the *Criminal Code*, but then pursue strategies that subvert the substantive intent of the rule.⁶³ For example, in *R v Tapper* counsel for the accused sought to cross-examine the thirteen-year-old complainant on previous acts of oral sex with individuals other than the accused.⁶⁴ As discussed above, section 276 of the *Criminal Code* categorically prohibits evidence of a complainant’s sexual history (with the accused or anyone else) when it is being used to support either the inference that a person, due to the sexual nature of the prior activity, is more likely to have consented to the alleged assault or that she is less credible by virtue of her sexual history.⁶⁵ However, such evidence will be admissible if it is introduced to substantiate other inferences. To be admissible on this basis it must relate to specific instances of sexual activity; it must be relevant to an issue at trial; and its probative value must outweigh its prejudicial effect.⁶⁶ In *Tapper*, defence counsel argued

⁵⁸ *R v STM*, *supra* note 51 at 39, 45.

⁵⁹ See for example *R v Kergan*, *supra* note 51 at 41, 50; *R v RJ*, 2004 CarswellOnt 904 at 19; *R v CDA*, 2010 SKQB 194, 2010 CarswellSask 348; *R v LeBlanc*, 2011 CMAC 4, 427 NR 341; *R v Rhodes*, 2011 MBCA 98, 281 CCC (3d) 29, “Factum of the Appellant”.

⁶⁰ “*Criminal Code*”, *supra* note 22; “*Ewanchuk*”, *supra* note 32.

⁶¹ *Supra* note 1.

⁶² *Supra* note 59.

⁶³ See for example *R v Tapper*, 2009 NLTD 142, 289 Nfld & PEIR 303; *R v S(DR)*, 1999 CarswellAlta 373 at 7, 247 AR 315; *R v Quesnelle*, 2010 ONSC 2698 at 4, 76 CR (6th) 146, *R v B(JW)*, 1999 CarswellNat 2763 at 21.

⁶⁴ *Tapper*, *ibid*. He also sought to cross-examine the complainant’s boyfriend regarding her sexual history with him.

⁶⁵ *R v Darrach*, 2000 SCC 46, 2 SCR 443.

⁶⁶ *Supra* note 22 at s 276(2).

that “the statement of S.M. [to the police] that she performed oral sex on multiple partners and has had intercourse suggests a greater likelihood that she also had sexual relations with Mi.T., who was her boyfriend.”⁶⁷ He argued that section 276 did not apply in this circumstance because he was not using the evidence of prior acts of oral sex to discredit the complainant or raise a reasonable doubt as to consent with the accused. Instead, he suggested he was relying on the prior sexual acts to show that the Crown’s physical evidence of recent sexual intercourse was with the complainant’s boyfriend and not the accused. In other words, the evidence of prior sexual history was not being used to prove she consented to sex with the accused, it was being used to prove she consented to sex with her boyfriend. This was of course true. But consider the reasoning the defence was suggesting: the fact that the thirteen year old complainant performed oral sex on other men suggests she must have been having consensual sex with her boyfriend. In other words, that she consented to sex with person A should be taken to prove that she also consented to sex with person B. The relevance of this evidence was contingent on the very inference that courts have repeatedly said is baseless and discriminatory⁶⁸ and that Parliament has taken steps to preclude through section 276. In refusing the accused’s application the Court in *Tapper* recognized that to permit such cross-examination would “undermine the very reasons why Parliament included section 276 in the *Criminal Code*.”⁶⁹ The Court recognized that such evidence would be speculative, misleading, highly prejudicial and likely to introduce bias or discriminatory belief in the minds of the jury.⁷⁰

Reasoning reliant on any of these three social assumptions constitutes an error of law. Why then would lawyers continue to invoke these narratives about women and sexual assault?

Some scholars have offered an efficiency rationale based on the reality of pro forma defences to explain why defence counsel continue to employ these strategies.⁷¹ Given the “formulaic character of defending in criminal cases...counsel do not devise utterly new forensic methods for every trial. They rely on standard stories.”⁷² The argument is that “constraints of time and money operate to encourage a system in which events are reconstructed into a limited range of stories.”⁷³

This may be an overly innocuous explanation. Certainly a review of Canadian sexual assault cases demonstrates that lawyers and the judicial process more broadly tell the same stories about rape over and over again. However, it may be that many defense counsel rely on evidence and lines of argument that invoke these ingrained stereotypes about sexual violence either because they themselves, as is likely true of broader society, continue to understand the issue of sexual violence through these social scripts or because

⁶⁷ *Supra* note 63 at 4.

⁶⁸ *Darrach*, *supra* note 65; *Seaboyer*, *supra* note 22.

⁶⁹ *Tapper*, *supra* note 63 at 22.

⁷⁰ *Ibid* at 20, 23.

⁷¹ *Supra* note 46 at 241.

⁷² *Ibid*, quoting Paul Rock, *The Social World of an English Crown Court: Witness and Professionals in the Crown Court Centre at Wood Green* (Oxford, UK: Oxford University Press, 1993) at 83.

⁷³ *Ibid*.

they believe that invoking them will be effective for their client. In other words, they pursue these strategies not for the sake of efficiency but rather because of an expectation that triers of fact will make the impermissible inferences favourable to their client that these law reforms reject.

This explanation raises empirical questions. Do lawyers ascribe to these rejected social assumptions about sexual violence? Do lawyers believe that triers of fact are inclined to ascribe to them? An affirmative answer to either question would support an inference that indeed lawyers do invoke these social assumptions intentionally and strategically.

In one United Kingdom-based study by Jennifer Temkin, barristers reported that “juries were not inclined to convict when someone was depicted as a slut”.⁷⁴ Participant lawyers agreed that the complainant’s sexual character and manner of dress influence trial outcomes and that nonconsensual sex between ongoing sexual partners - i.e. where the accused has a sexual history with the complainant – is not as serious a violation as is forced sex between strangers.⁷⁵ Some of the barristers interviewed interpreted the victim’s behavior at the time of the incident as a key factor in whether there would be a conviction. Barristers reported that juries wouldn’t convict where the women “put themselves at risk” by acting provocatively, or dressing in a certain manner.⁷⁶ Lawyers interviewed for Temkin’s study consistently reported that sexual history is almost always relevant to consent. Participant lawyers reported that a woman who has had a lot of sexual experience is more likely to have consented to the sex at issue in the charge.⁷⁷

Temkin’s study is over ten years old and its subjects were members of the UK bar (a jurisdiction where sexual assault law reform occurred later and in different form than in Canada).⁷⁸ That said, Ruth Lazar has done empirical work in the Canadian context that suggests similar views among Canadian lawyers. Lazar has demonstrated the prevalence of stereotypical attitudes on the part of defence counsel in marital rape cases in Ontario – such as the view that “consent is continuous and persisting in intimate relationships”.⁷⁹

More generally, there is a significant body of empirical research that confirms: the tenacity of these social assumptions among the public; the impact these stereotypes have on the reporting and prosecution of sexual violence; and the continued relationship between acceptance of these social assumptions about sexual violence and negative credibility assessments regarding sexual assault complainants.⁸⁰ It is important, for the

⁷⁴ *Supra* note 46.

⁷⁵ *Ibid* at 233, 234.

⁷⁶ *Ibid* at 234.

⁷⁷ *Ibid* at 235.

⁷⁸ Significant reform to the substantive law of sexual assault did not occur in Britain until 2003. See *Sexual Offences Act* (2003) c 42, UK. Reforms to many of the same types of laws addressed by this act occurred years earlier in Canada. Beginning in 1982 with *An Act to Amend the Criminal Code in relation to sexual offences and other offences against the person*, *supra* note 19, and continuing in 1987 (SC 1987, c 34, ss 1-8), 1992 (SC 1992, c 38, ss 1-3) and 1997 (RSC 1997, c 30, ss 1-3).

⁷⁹ Ruth Lazar, “Negotiating Sex – The Legal Construct of Consent in Cases of Wife Rape in Canada” (2011) 22:2 CJWL 329 at 340; see also Jennifer Koshan, “The Legal Treatment of Marital Rape and Women’s Equality: An Analysis of the Canadian Experience” (October 2010), online: <theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf>.

⁸⁰ In a 2005 study commissioned by Amnesty International (surveying 1000 members of the general public in the United Kingdom) 26% of participants thought a woman was totally or partially to blame if she was dressed

purposes of this discussion, to underscore the availability of this empirical evidence demonstrating the ubiquity, entrenched nature, and impact of these legally rejected narratives about rape. As will be discussed below, because of the schematic way in which triers of fact reason in sexual assault cases, the empirical reality of these engrained social assumptions about sexual violence informs the contours of the professional responsibility not to invoke them.

III. Legal Rejection of Social Assumptions Creates Ethical Obligations on Defence Counsel

Joshua Cain was charged with aggravated sexual assault, choking to overcome resistance and threatening death.⁸¹ He and the complainant met at a music event and decided to go for a walk. During the walk they kissed consensually. In response to the complainant's request that they cease kissing, Cain is alleged to have threatened to kill her,

provocatively. Twenty-two percent thought that a woman was totally or partially to blame if it was known that she had had several sexual partners. Amnesty International, *Sexual Assault Research Summary Report* (2005 November 21) online: Amnesty International UK <http://www.amnesty.org.uk/news_details.asp?NewsID=16618>. See also Shannon Sampert, "Let Me Tell You a Story: English-Canadian Newspapers and Sexual Assault Myths" (2010) 22 CJWL 301 (examining media discourse about sexual assault the author demonstrates the prevalence of stereotypes about sexual assault in English Canadian newspapers); Marc Klippenstine & Regina Schuller, "Perceptions of Sexual Assault: Expectancies Regarding the Emotional Response of a Rape Victim Over Time" (2012) 18:1 Psychology, Crime & Law 79 (showing that participants' perceptions of sexual assault complainant's were negatively influenced where the complainant's post-assault behavior did not comport with how participants expected a victim of sexual assault should act); Allyson Clarke & Karen Lawson, "Women's Judgments of a Sexual Assault Scenario: The Role of Prejudicial Attitudes and Victim Weight" (2009) 24:2 Violence and Victims 248 (demonstrating that attributions of victim fault were positively associated with adherence to rape myths and were higher toward thin victims than overweight victims); Marian Morry & Erica Winkler, "Student Acceptance and Expectation of Sexual Assault" (2001) 33:3 Canadian Journal of Behavioral Science 188 (demonstrating that attributions of victim fault were positively associated with adherence to rape myths); Jennifer Temkin & Barabra Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart Publishing, 2007); Stacey Futter & Walter Mebane Jr, "The Effects of Rape Law Reform on Rape Case Processing" (2001) 16 Berkeley Women's LJ 72 at 83 (reviewing a number of empirical studies demonstrating the limited impact of rape law reform in the American context); Ashley Wenger & Brian Bornstein, "The Effects of Victim's Substance Use and Relationship Closeness on Mock Juror's Judgments in an Acquaintance Rape Case" (2006) 54 Sex Roles 547 (concluding that less rape myth acceptance meant higher victim credibility assessments by participants); Lousie Ellison & Vanessa Munro, "Jury Deliberation and Complainant Credibility in Rape Trials" in Clare McGlyn & Vanessa Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (New York: Routledge, 2010) at 281-293; Sarah Ben-David & Ofra Schneider, "Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance" (2005) 53:5 Sex Roles 6 (demonstrating significant negative correlations between gender-role attitudes and four measures of rape perception); Janice Du Mont, Karen-Lee Miller & Terri Myhr, "The Role of 'Real Rape' and 'Real Victim' Stereotypes in the Police Reporting Practices of Sexually Assaulted Women" (2003) 9:4 Violence Against Women 466 (showing that women were more likely to report a sexual assault to the police in cases that involved the use of physical force and the occurrence of physical injury); Janice Du Mont & Terri Myhr, "So Few Convictions: The Role of Client-Related Characteristics in the Legal Processing of Sexual Assaults" (2000) 6:10 Violence Against Women 1109 (showing that cases where the women did not physically resist were less likely to result in a charge).

⁸¹ *R v Cain*, 2010 ABCA 371, 502 AR 322 at 22.

put his hand around her throat, choked her into unconsciousness and penetrated her vaginally while she was blacked out.⁸² Cain admitted to choking the complainant and having sex with her, but claimed it was consensual. In a portion of his statement to the police, which was excluded at trial, Cain told the police he needed help so that he would never again “hurt girls, choke girls, rape girls”.⁸³ During his closing submissions defence counsel for Cain, Naeem Rauf, suggested that the complainant’s failure to call her parents immediately or to leave the music event were inconsistent with her allegations of assault. (She reported the attack to police at six am the following morning). To support his assertion that her post-assault conduct was not consistent with someone who had been raped Naeem Rauf argued:

Look at what’s on her pink T-shirt the day after she’s raped she says. A picture of a penis. Does this suggest to you a young woman who has suffered trauma? A young woman who said, I would never do that; I would never lie down on the ground. Well, for heaven’s sakes. She’s been raped? You would think that would sober her up, but instead, she’s going around sporting a T-shirt with a picture of a penis.⁸⁴

Rauf went on to suggest that “if she [was] hurt emotionally, you’d think she’d be traumatized, she’d want to go home, she’d want to be with family, somebody who could comfort her, not partying away and then dawning a T-shirt on which somebody has drawn a male penis.”⁸⁵ Both the trial judge and the Court of Appeal concluded that it was far from obvious that there even was a penis drawn on her shirt.⁸⁶ (Note that in fact it does not matter whether she had a penis on her shirt. The suggestion that a woman is soliciting sex or is sexually promiscuous because she dresses proactively has long been discredited as a discriminatory stereotype.) More pertinent to this discussion, the hue and cry myth has been rejected at law. Why would Naeem Rauf make these kinds of arguments? Doubtless he made these comments either because he believed them or because he thought they would work with the jury - which they did. Cain’s jury acquittal was quashed by the Alberta Court of Appeal. The Court accepted the Crown’s challenge to Rauf’s conduct of the case.⁸⁷ Presumably the complainant will now undergo the ordeal of another trial. The arguments of defence counsel in this case were improper at law. Were they also unethical?

The remainder of this discussion demonstrates why even the most zealous advocates should agree that the three law reforms described in Part I give rise to ethical obligations not to trigger the social assumptions that unchaste women are untrustworthy

⁸² *Ibid.*

⁸³ *Ibid* at 17. Note that after having this segment of his testimony excluded Cain’s lawyer proceeded to ask Cain what he meant (in earlier portions of his statement) when he said he needed help. Cain testified that he meant he needed help with his drinking, leaving the jury with a misleading impression about his statement (para. 20).

⁸⁴ *Ibid* at 22.

⁸⁵ *Ibid* at 22

⁸⁶ *Ibid* at 30.

⁸⁷ In addition to appeals based on these comments the Crown also argued and the Court accepted that it was improper of him to suggest that an emergency room physician who saw the complainant after the incident disbelieved her because he didn’t x-ray her neck. This was both factually and legally improper. He misstated the physician evidence and it is improper to ask one witness to testify as to the credibility of another witness. *Ibid.*

and indiscriminate, that passivity communicates consent, and that delayed disclosure suggests false allegations.

The treatment of sexual assault complainants by defence counsel has been the site of significant debate for legal ethicists.⁸⁸ Even those with the strongest commitment to the ethics of zealous advocacy struggle with how to approach the cross-examination of sexual assault complainants.⁸⁹ Often the issue is characterized as one of particular concern in circumstances where the defence lawyer knows the complainant is telling the truth.⁹⁰

One of the most contentious issues in this debate pertains to the use of bias, stereotype and discriminatory tactics to advance one's client's position. Lawyers have a duty of loyalty to their clients.⁹¹ In defending a client against allegations of criminal wrong-doing this duty requires lawyers to raise every issue, advance every argument, and ask every question, however distasteful, that they think will help their client.⁹² Is the assertion that there is an ethical obligation not to employ strategies reliant on discriminatory attitudes and assumptions inconsistent with this duty of loyalty?

Abbe Smith, who along with Monroe Freedman is likely the most well known proponent of zealous and unmitigated advocacy, asserts that "[t]here is nothing unethical about using racial, gender, ethnic or sexual stereotypes in criminal defence. It is simply an aspect of

⁸⁸ For arguments which favour certain limits on vigorous or aggressive cross-examination of truthful sexual assault complainants see Michael Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001); David Layton, "The Criminal Defence Lawyer's Role" (2004) 27 Dal LJ 379. In the American context (in which the literature on this issue is much richer) see Robert Lawry, "Cross-examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering" (1995) 100 Dick L Rev 563; William Simon, "The Ethics of Criminal Defence" (1993) 91 Mich L Rev 1703; George Wright, "Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes and Character" (1994) 83 Ky LJ 801; David Luban & Harry Subin, "The Criminal Lawyer's 'Different Mission' Reflections on the Right to Present A False Case" (1987) 1 Geo J Legal Ethics 125; Harry Subin, "Is This Lie Necessary? Further Reflections on the Right to Present a False Defence" (1987) 1 Geo J Legal Ethics 689. For arguments in favour of establishing ethical boundaries which would circumscribe defence counsel conduct through resort to external principles or values such as those underpinning the Constitution see William Simon, *The Practice of Justice: A Theory of Lawyer's Ethics* (Cambridge, Mass: Harvard University Press, 1998). For arguments with a very strong commitment to the need for zealous cross-examination of all crown witnesses see Monroe Freedman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" (1966) 64:8 Mich L Rev 149; Eleanor Myers & Edward Ohlbaum, "Discrediting The Truthful Witness: Demonstrating the Reality of Adversary Advocacy" (2000) 69 Fordham L Rev 1055; Abbe Smith, "Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things" (2000) 28 Hofstra Law Review 925; Tim Dare, "Mere Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers" (2004) 7:1 Legal Ethics 24 (distinguishing between zeal and hyper zeal).

⁸⁹ See Monroe Freedman & Abbe Smith, *Understanding Lawyer's Ethics* (Newark, NJ: Lexis-Nexis/M Bender, 1990) at 168, where he concedes that the harm done to the truthful sexual assault complainant through vigorous cross-examination is severe and as such he personally can't do it.

⁹⁰ "Monroe Freedman", *supra* note 88 at 1469 (His first question: "Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?") Layton, "The Criminal Defence Lawyer's Role", *supra* note 88; Harry, "The Criminal Lawyer's 'Different Mission'", *supra* note 88.

⁹¹ Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: Federation of Law Societies of Canada, 2011) at Chapter 2.04 Commentary.

⁹² *Ibid* at Chapter 4.01: The Lawyer as Advocate.

zealous advocacy.”⁹³ She notes that “of course, most bias and prejudice works *against* the accused, disproportionate numbers of whom are poor and nonwhite.”⁹⁴ One cannot “zealously represent the criminally accused and simultaneously tend to the feelings of others.”⁹⁵ Defence lawyers should, according to Smith, recognize that prejudice is a fact of life and use whatever strategies are available to them.⁹⁶

Others have argued that it is unethical for lawyers to conduct their cases in a manner that perpetuates racist and sexist attitudes and hierarchies.⁹⁷ William Simon asserts that lawyers’ ethics are not defined simply by the overarching principle of duty to the client.⁹⁸ He suggests that a lawyer’s ethical obligations should be dictated by legal values. They should be determined on a case-by-case basis and assessed with a view to what will, in a particular case, do the most to advance justice.⁹⁹ Similarly, Anthony Alfieri suggests that lawyers should be more community centered.¹⁰⁰ Lawyers should adopt a “color-conscious, pluralist approach to advocacy that honors the integrity of diverse individual and collective identities *without* sacrificing effective representation.”¹⁰¹

The point of tension in this ethical debate relates to one’s conception of the lawyer’s duty of loyalty. Is it a duty owed only to one’s client or is there some broader duty owed by lawyers to the community? This same tension is reflected in legal terms. With respect to the use of discriminatory stereotypes in sexual assault trials the legal issue is typically framed as an ostensible conflict between a defendant’s right to full answer and defence and a complainant’s privacy and equality interests.¹⁰² The relationship between this legal tension and the ethical obligations on defence counsel is explained below.

III.A The Justification for Imposing Ethical Obligations Not to Trigger These Social Assumptions

Ethical lawyering confines advocates to practice within the bounds of law. To establish the claim that lawyers have an ethical obligation not to rely on strategies that invoke the three social assumptions reviewed above, the remaining discussion demonstrates both that refraining from such strategies is not a violation of one’s duty of loyalty to the client and that persisting in such tactics is a violation of other ethical duties owed by the lawyer. In the paragraphs to follow I argue that the rationale for the law reforms reviewed above, considered in conjunction with the jurisprudence interpreting the

⁹³ Abbe Smith, “Defending Defending”, *supra* note 88 at 954.

⁹⁴ *Ibid* at 954.

⁹⁵ *Ibid*.

⁹⁶ *Ibid* at 955.

⁹⁷ See for example Anthony Alfieri, “Defending Racial Violence” (1995) 95 Colum L Rev 1301 at 1320; William Simon, “The Ethics of Criminal Defence”, *supra* note 88.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

¹⁰⁰ Alfieri, *supra* note 88.

¹⁰¹ *Ibid* at 1307.

¹⁰² Apparent conflicts between different constitutional guarantees are resolved through a balancing process (*R v Dagenais*, [1994] 3 SCR 835, 120 DLR (4th) 12; *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, 1 SCR 772; *R v Osolin*, [1993] 2 SCR 313, 162 NR 1), in which each right is defined through contextual interpretation which accommodates the other.

content of the right to full answer and defence, and the intransigence of these social assumptions once triggered, establishes that: i. an ethical obligation on defence counsel to refrain from such strategies does not circumscribe the defendant's constitutional rights and; ii. this ethical obligation flows as an inevitable consequence of these reforms to the law of sexual assault in Canada.

i. The Right to Full Answer and Defence Has Both Internal and External Limits

One key aspect of a defence counsel's duty of loyalty to his or her client entails the protection of a client's constitutional right to full answer and defence. This is not debatable. The right to full answer and defence against allegations brought by the coercive authority of the state is a fundamental component of democracy. Nevertheless, as with all guarantees, the right to full answer and defence is not without limits.¹⁰³ It is a guarantee of due process. It is not a right to pursue any and every defence possible.¹⁰⁴ For instance, the right to cross-examination, a fundamental component of full answer and defence, is not boundless.¹⁰⁵ The right to cross-examination is circumscribed by concepts of reasonableness and good faith. For example, a cross-examiner is not entitled to raise a particular defence unless they have some knowledge, experience or reasonable hypothesis to support it.

The principles of fundamental justice do not entitle an accused to "the most favorable procedures that could possibly be imagined".¹⁰⁶ The parameters of full answer and defence are informed by other guarantees, such as the constitutional protection of equality and privacy.¹⁰⁷ Where there is an apparent conflict between these rights the content of each is to be interpreted through a balancing process.¹⁰⁸ (In other words, the conflict is resolved at the definitional stage and is therefore apparent rather than real.¹⁰⁹) "When the protected rights of two individuals come into conflict... Charter principles require a balance to be achieved that fully respects the importance of both sets of rights."¹¹⁰ Significant to this discussion, such balancing is to be done contextually.¹¹¹ This suggests that in cases involving allegations of sexual violence "an appreciation of myths and stereotypes...is essential to delineate properly the boundaries of full answer and defence."¹¹² The following two examples demonstrate how these legal principles have been conceptualized in the sexual assault context.

As discussed above, evidence of a complainant's sexual history is categorically

¹⁰³ *R v Lyons*, [1987] 2 SCR 309, 44 DLR (4th) 193; *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1; *Seaboyer*, *supra* note 22.

¹⁰⁴ *Lyons*, *ibid.*

¹⁰⁵ *R v Lytle*, [2004] 1 SCR 193, 2004 SCC 5.

¹⁰⁶ *Lyons*, *supra* note 103 at 88.

¹⁰⁷ *Seaboyer*, *supra* note 22; *Osolin*, *supra* note 102.

¹⁰⁸ *Dagenais*, *supra* note 102.

¹⁰⁹ See John McInnis & Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29 UBC Law Rev 341.

¹¹⁰ *Ibid* at 72.

¹¹¹ *Mills*, *supra* note 103 at 64.

¹¹² *Ibid.*

prohibited where the defence seeks to admit it in order to infer that solely because of this sexual experience the complainant is more likely to have consented to sex with the accused or is less credible.¹¹³ Recall, however, that the accused is entitled to introduce evidence of specific instances of previous sexual activity to give rise to other inferences if that evidence has significant probative value that is not substantially outweighed by the prejudice it poses to the administration of justice.¹¹⁴ In this sense there are two layers to section 276. It is designed to exclude irrelevant information. It is also designed to exclude evidence that is relevant but which has a prejudicial effect on the administration of justice that outweighs its probative value.¹¹⁵ In these latter circumstances, when assessing whether the probative value of the complainant's sexual history is substantially outweighed by its prejudicial effect, a court must balance factors such as the right of the accused to make full answer and defence, the need to encourage the reporting of sexual assaults, the need to remove discrimination and bias from the fact finding process, and the potential prejudice to the complainant's dignity and privacy.¹¹⁶ Whether a particular accused's right to full answer and defence entitles him to introduce evidence of a complainant's prior sexual history (to raise an inference other than one of the "twin myths") is to be determined in part by weighing the accused's interests against the impact that admitting it would have on the complainant's equality interests. Will it cause humiliation to the complainant? Will allowing it discourage other complainants from reporting incidents of assault? Is its relevance outweighed by its potential to trigger discriminatory attitudes and bias?

Consider a second example. Section 278 of the *Criminal Code* limits an accused's access to third party records containing personal information about the complainant.¹¹⁷ It establishes a multi-stage procedure aimed at protecting the privacy interests of complainants by denying access where the request for disclosure is based on discriminatory rationales.¹¹⁸ In determining whether to order production of records (in which the complainant has a reasonable expectation of privacy) the judge is required to balance the accused's right to full answer and defence with the privacy and equality rights of the person to whom the record relates.¹¹⁹ In conducting this balance judges are required to consider the accused's interests, the complainant's rights and broader societal concerns such as the need to encourage complainants to obtain treatment.¹²⁰

The content of the right to full answer and defence is interpreted in part by its relationship to these other constitutional rights. However there are other limits on this guarantee. For the purposes of this discussion the parameters of the right to full answer and defence should be divided into two categories: internal limits and external limits. Together they define the content of the right to full answer and defence. Limits derived from the balance between the right to full answer and defence and other constitutional guarantees, such as those discussed in the preceding two examples, might be described as external limits.

¹¹³ *Criminal Code*, *supra* note 22 at s 276.(1)(a) & (b).

¹¹⁴ *Criminal Code*, *supra* note 22 at s 276.(2).

¹¹⁵ *Supra* note 65 at 43.

¹¹⁶ *Criminal Code*, *supra* note 22 at s 276.3(3).

¹¹⁷ *Criminal Code*, *supra* note 22 at s 278.1 to s 278.91.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid* at s 278.5.

¹²⁰ *Ibid.*

Internal limits are those that are derived from interests internal to the guarantee itself. The right to full answer and defence is a right to a fair trial. An accused does not have the right to admit irrelevant evidence nor evidence for which the probative value is outweighed by the prejudicial effect on the trial process. “The right to full answer and defence is not engaged where the accused seeks information that will only serve to distort the truth-seeking purpose of a trial.”¹²¹ It is limited to evidence, cross-examination, and argument that are consistent with a fair trial. This limit on the right is internal in the sense that both the right and the limit are underpinned by the same principle: fairness. Evidence or argument that distorts the truth seeking purpose of a trial compromises its fairness. Internal limits, in contrast to external limits, are not interpreted by balancing the right to full answer and defence with other *Charter* guarantees. They are derived from general rules of evidence. “Counsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or more generally putting questions whose probative value is outweighed by prejudicial effect.”¹²² Lawyers need a good faith basis to pursue a line of questioning.¹²³ A good faith basis according to the Supreme Court of Canada means a hypothesis that is honestly advanced on the strength of *reasonable* inference.¹²⁴ Lawyers are barred from posing questions or introducing evidence that is irrelevant, that is not based on a reasonable assumption, or that is calculated to mislead.¹²⁵

The three legal reforms obligating defence counsel not to invoke the three social assumptions discussed above constitute internal limits on the right to full answer and defence. There is no good faith basis upon which to ask questions or introduce evidence aimed at invoking reasoning that is reliant on one of these three rejected social assumptions. Consider, for example, the issue of delayed disclosure. It is an error of law to draw an adverse inference as to the credibility of a complainant based solely on the timing of the complaint. Consequently, evidence of the timing of a complaint introduced for the purposes of suggesting that a delay alone raises questions regarding the veracity of a complainant is irrelevant. It is evidence introduced to give rise to an impermissible inference. In other words, it is probative of an inference that, if adopted, constitutes an error of law. As such, and as Justice McLachlin (as she then was) stated in *Seaboyer* (with respect to the use of prior sexual history to trigger the twin myths), when introduced for this purpose its prejudicial value will always outweigh its probative effect.¹²⁶ Such inferences, because they are baseless and irrelevant, risk distorting the truth seeking process. These three law reforms (because they explicitly reject these three social assumptions about sexual violence), in conjunction with the basic law of evidence,¹²⁷ and

¹²¹ *Mills*, *supra* note 103 at 94.

¹²² *R v Lyttle*, 2004 SCC 5 at 44, 1 SCR 193.

¹²³ *Ibid* at 47.

¹²⁴ *Ibid* at 48.

¹²⁵ *Ibid*.

¹²⁶ *Supra* note 22 at 248.

¹²⁷ Irrelevant evidence is inadmissible. Evidence is inadmissible where its probative value is outweighed by its prejudicial effect. See Alan Bryant, Sidney Lederman & Michelle Fuerst, *Sopinka and Lederman: The Law of Evidence in Canada*, 3d ed (Toronto: LexisNexis Canada, 2009).

the legal limits on cross-examination, create internal limits on the content of the right to full answer and defense for individuals accused of sexual assault. They do so by rendering inferences based on these rejected assumptions categorically irrelevant. An accused's right to full answer and defense does not include a right to reliance on these legally rejected social assumptions. It follows then that a defence lawyer is not compromising the duty to protect his client's right to full answer and defence by refusing to trigger these legally rejected social assumptions.¹²⁸

That it isn't necessary, at least in making sense of these three limits, to balance an accused's right to full answer and defence with the constitutional guarantee of equality should not be understood to undermine the role of equality in establishing these ethical boundaries. To be clear, these internal limits are informed by concepts of equality just as the external limits discussed above aim in part to protect the administration of justice. None of these constitutionally guaranteed interests are antinomical. Feminists convinced legislators and courts that reforms to the substantive law of sexual assault and the law of evidence must reflect the irrelevance, groundlessness, and sexism of these three social assumptions about sexual violence.¹²⁹ The principle of equality is ever-present in this analysis: it has been internalized into the substantive and evidentiary law. Recognition of the irrelevance and total unreliability of these assumptions (which is a recognition in promotion of equality for women) is internal to the assessment of probative value. Where a determination of irrelevance has been incorporated into the substantive law or law of evidence itself there is no balancing to be done. In this sense, there is no ostensible conflict between the rights of the accused and those of the complainant or the community at large with respect to preclusion of inferences premised on these three social assumptions.¹³⁰

ii. These Ethical Obligations Do Not Require Lawyers to Divide Their Loyalties

Returning to the debate instigated by the words of Lord Brougham and taken up by legal ethicists like Monroe Freedman and William Simon: does an advocate "know but one person in all of the world"¹³¹ or are the loyalties of lawyers divided between the client and the community, as Alfieri argues?¹³² Thankfully in Canada, with respect to defence counsel strategies that elicit evidence or reasoning which breaches the internal limits on the right

¹²⁸ This is the case whether the lawyer believes she is cross-examining a truthful witness or not. This dispenses with the critique that placing ethical limits of this nature on defence counsel will deter clients from being forthcoming with their lawyers.

¹²⁹ Renate M Mohr & Julian V Roberts, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994); Ewanchuk, *supra* note 32, LEAF, "Factum of Intervener".

¹³⁰ For example consider the Court's statement in *Mills*, *supra* note 103, regarding access to third party records. "The accused will have no right to the records in question insofar as they contain information that is either irrelevant or would serve to distort the search for truth". This should mean that one needn't even consider other interests such as the privacy interests of the complainant or the need to support complainants ability to access counseling. Thus the apparent conflict and need to balance only arises in cases where the evidence has some relevance, some probative value. The Court goes on to note that where there is a conflict (i.e. where the records do have some probative value) then the rights must be defined contextually.

¹³¹ See Monroe Freedman, "Henry Lord Brougham - Advocating at the Edge For Human Rights" (2000) 36 *Hostra Law Review* 311 at 311, quoting from The Authenticated Journals of the House of Peers, *The Trial At Large Of Her Majesty, Caroline Amelia Elizabeth, Queen Of Great Britain; In The House Of Lords, On Charges Of Adulterous Intercourse* (London: Printed for T. Kelly, 1821).

¹³² *Supra* note 88.

to full answer and defence, the answer does not matter. There is no balancing to be done. Judges (and lawyers) do not need to engage in contextual interpretation, or a weighing of factors or interests at stake to assess the relationship between reliance on this type of evidence or argument and an accused's right to full answer and defence. "Lawyers may only ask questions that are relevant, admissible, based on good faith belief and which are not specifically precluded by the law of evidence."¹³³

Justifying the imposition of an ethical obligation on lawyers to pursue defence strategies only if they strike a just balance between their clients' interests, the complainant's interests, and broader societal interests requires ascribing to something like Simon's jurisprudential ethics or Alfieri's assertion that lawyers be more community centered.¹³⁴ That is a more ambitious claim than the one made in this paper.¹³⁵ To be clear, it is a claim that should be advanced and that in Canada is supported both by legal principles and legal ethicists.¹³⁶ It is also a reflection of how far there is to go that even the modest claim that ethical lawyers litigate within the bounds of law has yet to be widely accepted. The decision to narrow the claims advanced in this discussion is deliberate.¹³⁷

¹³³ Alice Woolley, *Understanding Lawyers' Ethics In Canada* (Markham, Ontario: LexisNexis, 2011) at 207.

¹³⁴ *Supra* note 88.

¹³⁵ "In some judicial settings, the mere suggestion that gender equality is relevant to the delineation of the rights of an accused person, or to the assessment of the relevance of evidence, sets one apart as a hysterical crusader, rather than a responsible and thorough advocate." John McInnis & Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality" *supra* note 109 at 344. Some scholars have argued that in a contest between an accused's right to full answer and defence and the equality and privacy interests of a third party to a criminal proceeding the accused's right, despite the Court's interpretations, tends to prevail. *Ibid*. If this is the case, it is not difficult to imagine significant resistance to the claim that not only must courts delineate the rights of the accused by balancing them with the interests of the complainant and the community but also that lawyers have an ethical obligation to do the same. Proponents of the traditional concept of legal ethical obligations as limited to application of some concept of role morality would argue that requiring lawyers to do the type of balancing suggested here would lead to lawyers imposing their personally held views and consequently uneven protection for the rights of the accused. See for a discussion on this point Katherine Kruse, "The Jurisprudential Turn in Legal Ethics" (2011) 53 *Ariz L Rev* 493. For research demonstrating the failure by courts to strike the right balance in the context of production of third party records see Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence, and the Disclosure of Personal Records" (2006) 43 *Alta L Rev* 73; Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 *Osgoode Hall LJ* 251; Melanie Randall, "Sexual Assault in Spousal Relationships, 'Continuous Consent', and the Law, Honest but Mistaken Judicial Beliefs" (2008) 32:1 *Man LJ* 144.

¹³⁶ See Alice Woolley, *Understanding Lawyers' Ethics in Canada*, *supra* note 133 at 212: "The identification of what is proper cross-examination, both in terms of how it is done and the type of questions that are asked, needs to take into account broader analysis of how to ensure the most effective adjudication of legal cases. Decisions must factor in fairness to all parties (and third parties) and the broader legal goals that a democratic society seeks to achieve." See Alice Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer" (1996) 9 *CJLJ* 61 (arguing that in Canada the traditional conceptions of the zealous advocate and role morality are modified by concepts like integrity).

¹³⁷ There are strategic reasons for confining the discussion here to an examination of the ethical duties arising as a consequence of the internal limits on full answer and defence discussed above. Judges are not required to make a finding in which the substantive rights of a third party or broader social concerns trump the due process rights they

That it is narrow in its application means that the argument should be persuasive, regardless of one's perspective about to whom a lawyer owes duties of loyalty. Lawyers have an ethical obligation to conduct their cases within the bounds of law. The law reforms reviewed above clearly delineate the bounds of law. The ethical obligations arising from these legal limits should be obvious even to those lawyers "who know but one person in all of the world".¹³⁸ Again, there is no balancing to be done. Nor does it matter whether the cross-examiner believes the complainant to be truthful.¹³⁹ Lawyers need only ask themselves whether the evidence they seek to admit is reliant, for its probative value, on one of these three underlying social assumptions. If the answer is yes, its use is unethical. This is the case whether or not one's model of legal ethics includes duties of loyalty to the community as well as the accused. Even those advocates who consider themselves bound in loyalty to the Holmesian bad man are also bound by law.¹⁴⁰ Legal limits give rise to ethical obligations.

This claim should not be controversial. Professional codes of conduct in Canada require of lawyers that every question posed is discharged by fair and honourable means and without illegality in a manner that respects the tribunal and promotes a fair trial.¹⁴¹ Fair, honourable and without illegality must mean within the bounds of law. Within the bounds of law in this context should mean consistent with law reforms that have categorically precluded the admission of some types of evidence, certain lines of cross-examination and certain arguments if introduced in an effort to invoke a stereotype that has been legally rejected. Certainly, the Supreme Court of Canada in establishing a good faith/reasonable hypothesis basis as the standard for permissible cross-examination discussed the issue in both legal and ethical terms.¹⁴² Alice Woolley, who describes herself as a proponent of zealous advocacy, also couches the issue in ethical terms.¹⁴³ In discussing the ethics of advocacy she maintains that "a lawyer should cross-examine witnesses within

have been charged with protecting. A finding, that is, which may wrongly be understood as one that threatens the legitimacy of the judicial institution itself.

For a discussion regarding how this concern is reflected in the distinction between the Court's approaches to substantive issues in sexual assault law and procedural issues see Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004); Christopher Manfredi, "Judicial Discretion and Fundamental Justice: Sexual Assault in the Supreme Court of Canada" (1990) 47 Am J Comp L 489.

¹³⁸ Freedman, *supra* note 131.

¹³⁹ Support for placing ethical limits on aggressive cross-examination is often confined to truthful complainants. See for example Layton, "The Criminal Defence Lawyer's Role", *supra* note 88. One of the critiques of this position is that placing such obligations on defence counsel will create a disincentive for accused to be forthcoming with their lawyers. This objection is baseless in a context where the limit is unrelated to the truthfulness of the witness.

¹⁴⁰ Oliver Wendell Holmes suggested that "if you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." "The Path of Law" (1897) 10 Harv. L. Rev. 457 at 459.

¹⁴¹ *Supra* note 91 at Rule 4.01 Commentary.

¹⁴² *Supra* note 122 at 46: "This appeal concerns the constraint on cross-examination arising from the ethical and legal duties of counsel." And at para 51: "A trial judge must balance the rights of an accused to receive a fair trial with the need to prevent unethical cross-examination. There will thus be instances where a trial judge will want to ensure that "counsel [is] not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box".

¹⁴³ Woolley, *supra* note 133.

the rules established by the law of evidence....”¹⁴⁴

The combination of the cognitive suasion that these social assumptions continue to carry and the need to provide defence lawyers with a wide latitude in the conduct of their cases explains why the duty not to invoke the social assumptions rejected through the three law reforms discussed in Part I must be understood as an ethical (as well as a legal) standard. That is to say, the relationship between the ubiquity and intransigence of these social assumptions (discussed in Part II),¹⁴⁵ the leeway defense counsel must be given in the conduct of their cases, and the absence of any issue of divided loyalties (due to the *categorical* rejection of these particular social assumptions as a consequence of these three law reforms) demonstrates why these particular legal limits give rise to *obvious* ethical obligations.

iii. Schematic Thinking Heightens Need For Ethical Obligation

Stereotypes, including the type discussed here, are a form of heuristic or schematic thinking. “One of the most significant lessons from cognitive psychology in the past quarter century is the idea that when people make judgments under conditions of uncertainty, they use shorthand methods of decision making called “heuristics.””¹⁴⁶ This lesson has important implications in legal contexts.¹⁴⁷ The role of schematic thinking in assessments of complainant credibility in sexual assault trials is well documented.¹⁴⁸ “Despite the fact that legal decision making is normatively defined as data driven, i.e. relying exclusively on the facts and the evidence, there is plenty of scope for schematic conceptions about rape

¹⁴⁴ *Ibid* at 212. To be clear Professor Woolley couches this discussion in the positive rather than the restrictive. She states for example that “where the law clearly permits the line of cross-examination to be pursued, and where the client instructs the lawyer to pursue it, then ethical representation of that client requires the lawyer to cross-examine the witness in that way” (at pg 212). That said, presumably she would agree that the converse is also true: where the law clearly prohibits a line of cross-examination, ethical representation of the client requires that a lawyer not cross-examine a witness in that way. Certainly her discussion of “ethical cross-examination” in *Understanding Lawyers’ Ethics in Canada* suggests this is the case. I should also note that Professor Woolley limits her discussion, in terms of examples, to the use of evidence of prior sexual history. However, there is nothing to preclude applying her analysis to the issue of delayed disclosure or the definition of consent.

¹⁴⁵ *Supra* note 80 discussing the empirical evidence of the prevalence of discriminatory beliefs about sexual violence.

¹⁴⁶ Nancy Levit, “Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory” (2006) 28 *Cardoza L Rev* 391.

¹⁴⁷ See for example Kristin Lane, Jerry Kang & Mahzarin Banaji, “Implicit Social Cognition and Law” (2007) 3 *Annual Review of Law and Social Science* 427 (examining the relationship between equal protection laws and implicit social cognition); Anders Kaye, “Schematic Psychology and Criminal Responsibility” (2009) 83 *St John’s L Rev* 565 (discussing, with respect to the issue of criminal responsibility, how “schematic blind spots and biases impair our “moral sensitivity”—and especially our sensitivity to morally significant facts about our circumstances—more often and more profoundly than we realize”).

¹⁴⁸ Barbara Krahe, Jennifer Temkin, Steffen Bieneck & Anja Berger, “Prospective Lawyers’ Rape Stereotypes and Schematic Decision Making About Rape Cases” (2008) 14:5 *Psychology, Crime & Law* 461 at 464. See also *supra* note 80.

rooted in rape myths to infiltrate.”¹⁴⁹ Fact finders in sexual assault trials reason based on these ways of knowing without even realizing that they do so.¹⁵⁰

The prosecution of sexual assault reflects a judicial process with a long and deep-seated history of discriminatory beliefs about women and a reality that in adjudicating allegations of sexual violation (which primarily means credibility assessments) finders of fact are almost always asked to make decisions under conditions of uncertainty. This makes schematic thinking particularly challenging and problematic in sexual assault trials. When a lawyer suggests to a complainant that the reason she didn’t tell anyone right away is because she is making it up, or points to a lack of physical injury as evidence of consent, he or she deploys a powerful heuristic that risks triggering reasoning which is both difficult to displace and wrong at law. The persuasiveness and intransigence of these entrenched stories about sexual violence divert reasoning from a process of legal findings based on relevant evidence. Lawyers who invoke these social assumptions distort the truth seeking process.¹⁵¹

It is not sufficient to make legal rules precluding the admissibility of evidence that relies on one of these three social assumptions for its relevance.¹⁵² “Not all improper cross-examination can be easily controlled by the trial judge given the “wide latitude” which lawyers have to ask questions.”¹⁵³ In the interests of protecting due process lawyers need to be given the latitude to demonstrate the relevancy of their evidence and arguments. However as a result, by the time it becomes apparent that a lawyer does not have a good faith/reasonable basis for pursuing a line of questioning “...it may be too late to repair the harm that arises...”¹⁵⁴ The nature of schematic thinking suggests that often it will already be too late when a judge tries to stop questions that trigger stereotypes such as the ones

¹⁴⁹ Krahe et al, “Prospective Lawyers’ Rape Stereotypes and Schematic Decision Making About Rape Cases” *ibid.* at 464

¹⁵⁰ *Ibid* at 464: “In combination these two studies provide evidence of schematic processing of information about rape cases that is incompatible with the normative prescription of data-driven information processing as a basis for decision making in this context.”

¹⁵¹ Levit, *supra* note 145: “Given the egocentric biases that researchers have documented, coupled with the tendencies toward stereotypic classifications, when decision makers use simplifying heuristics, they are likely to make mistakes in the direction of their pre-existing biases. The combined effects of these proclivities mean that decision makers are anchored in conventional patterns of thinking and that those patterns contain perceptual biases.” Levit summarizes the 1970s research of cognitive psychologists Amos Tversky and Daniel Kahneman: “Decision making often involves an abundance of information, time pressures, and an array of possible alternatives, people intuitively and unconsciously use cognitive shortcuts or “heuristics” to make decisions about probabilities. These simplifying heuristics lead to some predictable patterns of decisional errors.”

¹⁵² With respect to prior sexual history, it is true that section 276 provides for a two-step *voir dire* removing the finder of fact in those cases involving a jury. In most cases, however, the judge is the trier of fact. Jury trials are rare in superior courts and unavailable in provincial courts. Judges are steeped in the same culture and susceptible to the same social assumptions about a woman’s sexual experience as are jurors. See for example Janine Benedet, “Probity, Prejudice and the Continuing Misuse of Sexual History Evidence” 64 CR (6th) 72: “The trial judge in [*R v Sandfly*] discounted the possibility of prejudice or bias because the trial did not involve a jury. Regrettably, the judge went on to employ several lines of reasoning that relied on prejudicial stereotypes *en route* to acquitting the accused.” Moreover, as Melanie Randall’s work has demonstrated – particularly in cases involving allegations between on going sexual partners – evidence of prior sexual history is often admitted without anyone even raising the matter of a section 276 hearing. Melanie Randall, “Sexual Assault in Spousal Relationship”, *supra* note 135.

¹⁵³ Woolley, *supra* note 133 at 208.

¹⁵⁴ *Ibid.*

rejected by these three law reforms. Given the power of these social assumptions to distort the truth seeking process, provision of this wide latitude to defence counsel demands a concomitant ethical obligation on these lawyers not to trigger these legally rejected social assumptions.

Defence counsel also have a fundamental obligation to “employ every legitimate means of testing the evidence.”¹⁵⁵ As Jennifer Temkin notes, defence counsel should challenge every crown witness on any aspect of their evidence that is unclear, inconsistent or implausible.¹⁵⁶ They should test the complainant’s memory and reveal inconsistencies in crown witness testimony. They should ensure that only admissible evidence is introduced by the Crown. They should, using legitimate means, challenge the credibility of the complainant - unless they know or should know that she is testifying truthfully.¹⁵⁷ They should raise any technical arguments that are available. Ethical resolute advocacy in a sexual assault trial requires defence counsel to test the prosecution’s evidence in an effort to reveal every reasonable doubt. Doubts premised on any one of these three social assumptions are not reasonable.

Lawyers know the ins and outs of their cases better than do judges. In those cases where the Crown has honoured its disclosure obligations, no party to a criminal proceeding is more informed than the defence. Given the nuance of the legal limits imposed by these law reforms defence counsel are singularly situated to ensure that these limits (these protections of the truth seeking process) are maintained. For example, it is *the purpose* for which evidence of sexual history or delayed disclosure is offered that determines whether it is improper. Advocates are the ones that know (or should know) whether the lines of questioning they pursue or the arguments they advance have a legitimate purpose. This is a function the law and courts alone cannot adequately perform. Rulings of inadmissibility, admonishments to the jury, and sustained Crown objections may function retroactively and impotently.

III.B Contours of The Ethical Obligation Not to Trigger Legally Rejected Social Assumptions

Lawyers have an ethical obligation to be competent.¹⁵⁸ They also have a duty not to discriminate.¹⁵⁹ The duty not to discriminate and the requirement of basic competency make it incumbent upon any defense counsel whose practice includes defending individuals accused of sexual assault to educate themselves on the parameters that these three legal limits impose upon the conduct of a sexual assault trial. Competency in this context requires lawyers to be mindful, reflective, and aware of the assumptions

¹⁵⁵ *R v Titus*, [1983] 1 SCR 259 at 9, 144 DLR (3d) 577.

¹⁵⁶ Temkin, *supra* note 46.

¹⁵⁷ See Layton, *supra* note 88.

¹⁵⁸ See for example Federation of Law Societies of Canada, *Model Code of Professional Conduct*, *supra* note 91 at 201.(2).

¹⁵⁹ *Ibid.* Rule 6.3-5 at 100

motivating a particular strategy and of the relationship between these assumptions and the specific legal reforms discussed above. This requires lawyers to develop self-awareness of their own entrenched social assumptions. What heuristics do they rely upon in designing and evaluating the defence of a client accused of sexual assault? Lawyers must ask themselves why they are seeking to introduce evidence of, or make arguments regarding, delayed disclosure, prior sexual history, or the complainant's passivity. For example, are they introducing evidence of delayed disclosure because the lapse in time is so significant it raises questions about the complainant's ability to recall or are they introducing this evidence to trigger the social assumption that if she really had been raped she would have told someone promptly? If the evidence they seek to admit or the argument they advance is reliant, for its probative value, on one of the three legally rejected social assumptions identified in this discussion its use is unethical.

One might ask how these ethical obligations are to be instantiated. The relationship between ethical norms and rules, formal and informal sanctions, reputational harm, judicial regulation of lawyers, and professional disciplinary measures is the subject of a rich literature and debate that is beyond the scope of this discussion. The purpose of this discussion is to demonstrate that these ethical obligations exist. While developing the methods through which they might be actualized warrants a separate paper, I will offer a few preliminary comments on the issue of "enforcement".

A purely positivist approach to legal ethics, particularly in a context such as this, is unlikely to be successful. The limited empirical evidence that is available suggests that the judiciary is reluctant to exercise its inherent power to regulate/discipline the behavior of lawyers.¹⁶⁰ These three social assumptions are deeply embedded in our society and culture. What is required is a multi-pronged and interrelated approach aimed at changing social norms, changing legal culture, and educating the judiciary – the same tri-partite feminists have targeted for decades. A variety of strategies should be developed – some aimed at judicial and continuing legal education, some aimed at informal sanctions such as admonishment from the bench and for the most egregious and intentional violations strategies involving formal discipline by the profession's regulators. Law societies in Canada are charged with protecting the public. The responsibility to do so includes creating policies and processes that sanction lawyers who threaten the administration of justice by distorting the truth seeking process. Again, developing and articulating the specific strategies that should be employed to instantiate these ethical obligations should be the subject of future research and discussion.

The problematic stereotypes addressed in this discussion are not the only social assumptions about sexual assault identified by courts as groundless and discriminatory. The argument in this discussion focuses on these three in particular because inferential reasoning premised on them has been explicitly rejected through reforms to the law of sexual assault. As a result, even the most zealous advocates should be compelled by the assertion that they are ethically obligated not to invoke them.

There are myriad stereotypes about women and sexual violence as well as race,

¹⁶⁰ See Judith McMorow et al, "Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decisions, (2004) 32 Hofstra L Rev 1425; Judith McMorow, "The (F)utility of Rules: Regulating Attorney Conduct in Federal Court Practice, (2005) 58 SMU L Rev 3. See also Eli Wald, "Should Judges Regulate Lawyers?" (2010) 42 McGeorge Law Review 149.

class, sexual orientation, and disability that are invoked to discredit and oppress in intersecting and compounding ways participants in the legal system. The focus of this discussion has centered gender discrimination as the paradigmatic problem in sexual assault law. As misleading and problematic as this is – women’s oppression is, to borrow from Toni Williams, a function of inextricable “relations of ruling” based on ability, age class, gender, heterosexuality and race¹⁶¹ – it is also a function of the specific argument developed here. Sexual assault law reform has been informed by a particular feminist project – one that has (in a self-limiting way) centered primarily on gender discrimination. An argument, such as the one developed in this discussion, which turns on invoking substantive and evidentiary law reforms that prohibit certain social assumptions, will be driven by the particular social assumptions rejected. To date, in the sexual assault law context this means sexist assumptions. However, the same ethical obligations should arise in every instance where a baseless social assumption has been categorically rejected either through legislative or jurisprudential reform. Advocates should scrutinize significant changes to the law that result in legal rules governing the conduct of a trial. They should ask themselves whether the impetus for a particular reform was to incorporate into the substance of the legal rule a rejection of a discriminatory or problematic social assumption. If the answer is affirmative then the advocate is ethically obligated not to make argument or pursue cross-examination that relies for its relevance or coherence on the rejected assumption.

To illustrate this point using a (now) uncontroversial example, consider the legal rules governing testimonial competence. At common-law a witness was only competent to testify if they could demonstrate – by swearing on the bible – a belief in both God and divine retribution.¹⁶² The social assumption underpinning this law was that unless individuals feared God’s punishment in the afterlife for lying under oath they could not be trusted to testify truthfully. As a result, non-Christians could not testify. The law was initially reformed to allow oath ceremonies other than swearing on the bible.¹⁶³ Ultimately it was changed to allow witnesses to choose between affirming that they will tell the truth and taking an oath.¹⁶⁴ The impetus for changing the rule was the recognition that the assumptions about religion underpinning it were outdated.¹⁶⁵ One’s lack of devotion to God or any other Supreme Being is of no probative value to the credibility of a witness.¹⁶⁶

¹⁶¹Toni Williams, “Re-forming “Women’s” Truth: A Critique of the Report of the Royal Commission on The Status of Women in Canada” (1990) 22 Ottawa L. Rev. 725.

¹⁶² *Omychund v Barker* (1744), 1 Atk. 21, 26 E.R. 15 (C.A.).

¹⁶³ See for example *R v Wooley* (1902), 8 CCC 25, [1902] BCJ No 89 (BCSC).

¹⁶⁴ See for example *Canada Evidence Act*, R.S.C. 1985, c. C-5, s.14(2).

¹⁶⁵ *R v F(KJ)* (1982), 1 CCC (3d) 370, [1982] OJ No 153 (Ont CA) at 755; *Horsburgh v R* [1966] 1 OR 739, [1966] OJ No 1151 (Ont CA): “The contention that competency of a witness depends on demonstration that he or she is fearful of divine retribution... is highly talismanic. The common law deserves better than that at the hands of the judiciary in the 20th century.”

¹⁶⁶ Some evidence scholars have even suggested that the option to swear an oath should be eliminated to avoid “invidious distinctions on issues of credibility between one witness who swears and another who affirms.” Bryant, Lederman, & Fuerst *The Law of Evidence In Canada*, *supra* note 127 at 874.

It is, as a matter of law, irrelevant to this issue. It would be unethical for a lawyer to suggest to a trier of fact that they should draw an adverse inference as to credibility on the basis that a witness is Hindu or Buddhist or atheist.

Given the ethical limits that changes to the law place on lawyers, the judicial process might be well served by further reforms to substantive and evidentiary laws that render irrelevant in a categorical manner those social assumptions now understood to be baseless and grounded in prejudice and bias.

Conclusion

One of the main feminist critiques of relying on the legal system to address sexual violence is that the criminal law focuses entirely on individual actors. Sexual violence is a social problem. Yet the criminal law does not provide a systemic response to this systemic problem. For many feminists the inevitable conclusion is that indeed the master's tools did not dismantle his house.¹⁶⁷ Feminists have questioned the plausibility of relying on the criminal justice system to promote equality at all.¹⁶⁸ "Can a feminist reconstruction of sexual assault law, for example, truly promote egalitarian aims if other disadvantaged groups continue to form a disproportionately large percentage of those who get charged with sexual assault, and if the result of conviction is that they are incarcerated?"¹⁶⁹ This is a compelling argument and one that should be broached in any discussion on legal responses to sexual violence. It is an argument, though, for why lawyers, public actors and other individuals should develop non-judicial, non-carceral and non-individualistic responses to sexual harm – responses aimed at addressing the social conditions, channels of power, and relations of oppression that produce sexual violence. However, for those who have chosen to practice justice from within the courtroom – regardless of what side of the bench or aisle they sit on – this is a peripheral point. If legal advocates can agree on nothing else, surely they can agree to assume responsibility for promoting justice in the justice system – whatever their conception of what their role in this will be.

In a recent Manitoba case, Justice Dewar of the Manitoba Court of Queen's Bench received (well deserved) public censure, criticism from the media, and even an admonishment from the Canadian Judicial Council as a result of comments he made in his

¹⁶⁷ See Sheila McIntyre, "Redefining Reformism: The Consultations that Shaped C-49" in J Roberts & R Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) at 295.

¹⁶⁸ See Constance Backhouse, "A Feminist Remedy for Sexual Assault: A Quest for Answers" in Elizabeth Sheehey, ed. *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 725. Elizabeth Bernstein, "The Sexual Politics of the 'New Abolitionism'." (2007) 18(5) *Differences: Journal of Feminist Cultural Studies* 128-151. See also John McInnis & Christine Boyle, *supra* note 135 at 348: "It is illogical to think that criminal law is *capable of* promoting equality of any kind...[T]he system in practice appears to be most concerned with the protection of those already invested with power -property owners, businesses, and individuals whose status means that their complaints to the police are likely to be taken seriously- with the protection of the vulnerable being an often neglected afterthought."

¹⁶⁹ McInnis & Boyle, *ibid.* at 348.

sentencing decision of Kenneth Rhodes.¹⁷⁰ Rhodes was convicted of sexual assaulting a young Aboriginal woman.¹⁷¹ Justice Dewar found that Rhodes sexually assaulted the complainant by penetrating her vagina with his fingers and his penis, anally penetrating her with his penis, and assaulting her genitals with his mouth. Despite these findings, Justice Dewar, in imposing a two year conditional sentence to be served in the community, characterized Rhodes' conduct as that of a "clumsy Don Juan".¹⁷² He stated that "this is a case of misread signals and inconsiderate behavior. There is a different quality to these facts than found in many cases of serious sexual assault".¹⁷³ He pointed to the fact that she was wearing a tube top without a bra, makeup, and high heels and then suggested that "sex was in the air".¹⁷⁴ He emphasized that all of the parties had been drinking heavily, that there was no violence knowingly imposed by the accused, and that the complainant did not run away.¹⁷⁵

These comments are not just harmful to the complainant and an embarrassment to Justice Dewar (who apologized fully and unequivocally for the damage he caused).¹⁷⁶ Conduct such as this brings the legal profession and the judicial system as a whole into disrepute. It reflects poorly on the Canadian Judicial Council (which is responsible for training federally appointed judges and which, in the wake of Justice Dewar's decision took the unusual step of publicly defending the training of the federal judiciary¹⁷⁷) and on the judicial appointments process of the federal government.

¹⁷⁰ See for example Dean Pritchard, "Judge's Rape Ruling 'Disgusting'" *Toronto Sun* (25 February 2011), online: Canoe Sun Media <<http://www.torontosun.com/news/canada/2011/02/26/17418376.html>>; Mike McIntyre, "Rape Victim 'Inviting', So No Jail" *Winnipeg Free Press* (24 February 2011), online: FP Newspaper <<http://www.winnipegfreepress.com/breakingnews/rape-victim-inviting-so-no-jail--rape-victim-inviting-so-no-jail-116801578.html>>; Paul Thompson, "Judge Facing Calls to Resign After He Let Rapist Go Free Because Victim Sent Out 'Sex Was in the Air' Signal" *The Daily Mail* (27 February 2011), online: Associated Newspapers Ltd <<http://www.dailymail.co.uk/news/article-1361248/Judge-facing-calls-resign-let-rapist-free-victim-sent-sex-air-signals.html>>; Christie Blatchford, "Manitoba Judge is Dead Wrong in Rape Case" *The Globe and Mail* (24 February 2011), online: The Globe and Mail Inc <<http://www.theglobeandmail.com/news/national/manitoba-judge-is-dead-wrong-in-rape-case/article622513/>>. See also "Canadian Judicial Council Completes Its Review of Complaints Made Against Justice Robert Dewar" (9 November 2011), online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2011_1109_en.asp>; The Canadian Judicial Council was "of the view that Justice Dewar's remarks showed a clear lack of sensitivity towards victims of sexual assault.... [They found] that his conduct fell short of the high standard Canadians expect of all judges."

¹⁷¹ *R v Rhodes* (12 October 2012), Thompson, MB (MBQB).

¹⁷² *R v Rhodes*, [2011] MJ No 67 at 516.

¹⁷³ *Ibid* at 512.

¹⁷⁴ *Ibid* at 519.

¹⁷⁵ *Ibid*.

¹⁷⁶ From the report of the Canadian Judicial Council, *supra* note 169: "Justice Dewar has offered a full and unequivocal apology to the victim for the hurt she experienced from his comments. He also is aware that his comments may have been traumatic to other women who were victims of sexual assault and expressed his sincere regret for this."

¹⁷⁷ Mia Robson, "Judicial council defends training given to federally appointed judges" online: <http://www.winnipegfreepress.com/local/judicial-council-defends-training-given-to-federally-appointed-judges-117393468.html> (3 April 2011)

In all of the discussion regarding Justice Dewar's conduct what was not focused on was whether defence counsel in this case played any role in harming the complainant and bringing the administration of justice into disrepute. Justice Dewar's emphasis on her attire, on her failure to resist, on her decision to leave with the men, and on her consumption of alcohol revealed stereotypical thinking about women, Aboriginal people, Aboriginal women and sexual violence. Did the lawyers in this case trigger for this undertrained judge¹⁷⁸ particular social assumptions about this Aboriginal woman?

On appeal, counsel for the accused explicitly invoked the social assumption rejected by reforms to the definition of consent. He argued that Justice Dewar erred in his assessment of CP's credibility which lead (sic) to an unreasonable verdict when he failed to take into account CP's failure to run away from the Appellant during the sexual interaction. There is no evidence that the complainant was being restrained by the Appellant during the digital penetration or intercourse. Furthermore, during cross-examination the complainant admitted that during the oral sex, she was standing unrestrained and could have run away.¹⁷⁹

This is exactly the type of argument that lawyers should be ethically precluded from making.¹⁸⁰ "The story of failed [rape law] reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of law."¹⁸¹ A failure to impose ethical obligations on defense counsel not to make arguments like the one presented to the Court of Appeal in *Rhodes* perpetuates rather than responds to this failure. Lawyers who rely on and correspondingly perpetuate racist, classist, ableist and sexist beliefs bring the profession into disrepute. In the context of sexual assault cases lawyers who conduct their cases in this manner compound the systemic effects of sex, gender, race, ableism and class based discrimination on people who make allegations of sexual violation and on the integrity of the system aimed at responding to these allegations.¹⁸²

Limiting the focus of this paper to the ethical obligations arising from reforms to the substance of a legal rule that results in a categorical prohibition of a particular social assumption also leaves unresolved the question of whether lawyers also have an ethical obligation to refrain from invoking any of the many discriminatory and irrelevant attitudes that infect this system's judicial processes. Lawyers are under a duty not to

¹⁷⁸ From the report of the Canadian Judicial Council, *supra* note 169: "In his desire to approach social justice issues with greater sensitivity in the future, Justice Dewar met with an expert on gender equality. He is pursuing further professional development in this area as part of his commitment to become a better judge."

¹⁷⁹ *Rhodes*, *supra* note 170 at para 41, "Factum of the Appellant (Accused)".

¹⁸⁰ *Rhodes* successfully appealed his conviction. *Rhodes*, *supra* note 171.

¹⁸¹ Corey Rayburn, "To Catch A Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials" (2006) 15 Colum J Gender & L 437 at 438, quoting Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge, Mass: Harvard University Press, 1998) at 17.

¹⁸² This includes the perpetuation of discriminatory attitudes, the problem of disproportionate underreporting of this offence and potential harm to the individual complainant arising as a consequence of participating in a judicial process that degrades, humiliates and embarrasses her. It also risks further distortions to the truth seeking process. Victims who sense that defence counsel are going to harass them about irrelevant personal details or try to invoke degrading stereotypes may alter the way they conduct themselves. They may be less forthcoming about details regarding their conduct that could lend themselves to these stereotypical narratives. In a legal context where the outcome often turns on a he said/she said credibility contest evasion, under emphasis, and omission will be fatal to the complainant's credibility.

discriminate.¹⁸³ They are under a duty not to bring the administration of justice into disrepute.¹⁸⁴ Do the duties and responsibilities that lawyers bear that extend beyond the interests of their clients include a broader ethical duty not to invoke discriminatory beliefs or biases? Presumably they do. However, one need not embrace this claim in order to ascribe to the ethical obligations articulated in this discussion. The strength of the argument developed in this paper is that, given law reform in Canada, all lawyers should agree that it is unethical to distort the truth seeking process by invoking the baseless assumptions that a women who didn't fight back secretly wanted it, that women who fail to raise a hue and cry are lying or that women become untrustworthy and indiscriminate in their sexual choices once they have lost their chastity. As Alice Woolley concludes, in this way the moral quandary for lawyers in Canada has been eliminated.¹⁸⁵ With respect to social assumptions that have been categorically rejected by law reform lawyers are ethically obligated to practice equality. Where the protection and promotion of equality has been substantively incorporated into the content of fair process all lawyers become charged with protecting it.

¹⁸³ See for example Federation of Law Societies of Canada, *Model Code of Professional Conduct*, *supra* note 91 at 5.03 (5).

¹⁸⁴ See for example Federation of Law Societies of Canada, *Model Code of Professional Conduct*, *supra* note 91 at 3.01(2)(d),

¹⁸⁵ Woolley, *Understanding Lawyers' Ethics in Canada*, *supra* note 133 at 212.